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Doris Del Tosto

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Comments

THE BATTERED SPOUSE SYNDROME AS A DEFENSE TO A HOMICIDE CHARGE UNDER THE PENNSYLVANIA CRIMES CODE

I. INTRODUCTION

Women do not kill as often as men.¹ When they do, however, they most often kill their husbands or boyfriends,² frequently in response to abuse.³

In spite of statistics indicating that spouse abuse is a widespread problem,⁴ the legal system generally remains reluctant to become in-

1. See Note, *The Battered Wife Syndrome: A Potential Defense to a Homicide Charge*, 6 PEPPERDINE L. REV. 213, 219 (1978), quoting 1973 statistics compiled in D. MARTIN, *BATTERED WIVES* 14 (1976). See also Schneider, Jordan & Arguedas, *Representation of Women Who Defend Themselves in Response to Physical or Sexual Assault*, 4 NAT'L J. CRIM. DEF. 141, 145 (1978) [hereinafter cited as *Representation of Women*].

Figures on the rate of homicides committed by females vary with the source. Some authorities report that 15% of all persons arrested on homicide charges are women. *Id.*, citing R. SIMON, *WOMEN AND CRIME* 1 (1975); Price, *The Forgotten Female Offender*, 23 CRIME & DELINQUENCY 101, 103 (1977). But see Critics Assail (*Linking*) *Feminism with Women in Crime*, N.Y. Times, Mar. 14, 1976, at 48, cited in *Representation of Women*, *supra*, at 145, in which it is asserted that the rate is 10%. Sources generally agree, however, that the rate has remained stable. *Representation of Women*, *supra*, at 145.

2. *Representation of Women*, *supra* note 1, at 145-46; Note, *supra* note 1, at 219.

3. *Representation of Women*, *supra* note 1, at 141, 145-46.

4. Estimates of the number of families in which spouse battering occurs range from a low of three million to a high of 40 million. Meyers, *Battered Wives, Dead Husbands*, 6 STUDENT LAW. 47 (March 1978). Meyers notes that, according to one Harris Poll, "20 percent of all Americans, and 25 percent of those with college educations, condone the use of physical force within marriages. *Id.* Accurate statistics on the occurrence of spouse abuse are difficult to compile, however, because of victims' frequent reluctance to report the crime. Note, *supra* note 1, at 213. "While there are more police calls involving family violence than any other criminal activity, the FBI and other law enforcement experts consider wife beating to be the most under reported crime in the country." *Id.* A Delaware study of 57 families suggests the magnitude of the under-reporting problem, indicating that only one in 270 instances of wife-beating is ever reported to the authorities. Droskin, *Legal Alternatives for Battered Women Who Kill Their Abusers*, 6 AMER. ACAD. OF PSYCH. & LAW BULL. 335, 339 (1978). See also Steinmetz, *Wife Beating: A Critique and Reformulation of Existing Theory*, 6 AMER. ACAD. OF PSYCH. & LAW BULL. 322, 323 (1978); Note, *The Case for Legal Remedies for Abused Women*, 6 N.Y.U. REV. L. & SOC. CHANGE 135, 136 (1976) [hereinafter cited as *N.Y.U. Note*], citing Guthrie, *The Battered Wife: A Victim of Most Under-reported Crime*,

volved in domestic disputes⁵—a hesitancy which reflects a respect for basic privacy rights⁶ as well as practical considerations.⁷ Because of the great deference courts have traditionally given to the sanctity of the home, and to the family relationship,⁸ events occurring in the home are thought not to be the concern of police or prosecutors.⁹ In addition to this recognition of a privacy right, practical considerations lead many police departments to assign wife abuse calls a low priority,¹⁰ making police assistance slow in coming. Police answering domestic calls are exposed to a relatively high degree of danger, with more officers being injured or killed as a result of answering domestic dispute calls than any other type.¹¹ Furthermore, when police do respond, they often assume more of a "social work rather than enforcement role."¹²

Cleveland Press, Nov. 3, 1976, § C at 4, col. 3. This widespread failure to report domestic violence is generally attributed to fear or shame, and the inaccuracy of the figures is compounded by inadequate recording by the responsible agencies. *N.Y.U. Note, supra*, at 136.

5. *Representation of Women, supra* note 1, at 147. Some commentators suggest that the "law becomes ambiguous when the parties are living as man and wife." Eisenberg & Seymoor, *The Self Defense Plea and Battered Women*, 14 TRIAL 34, 35 (July 1978) [hereinafter cited as *Self Defense Plea*].

6. See notes 8 & 10 and accompanying text *infra*.

7. See notes 11 & 14 and accompanying text *infra*.

8. See *Griswold v. Connecticut*, 381 U.S. 479 (1965). In *Griswold*, the Supreme Court sustained a challenge to a law prohibiting the use, and advice as to the use, of contraceptives. *Id.* at 486. The Court expressed, among other things, its grave concern that the methods which would be necessary to enforce the statute's ban on use would involve an unconstitutional intrusion into the privacy of the marital bedroom. *Id.* at 485. Emphasizing that the right of marital privacy is "older than the Bill of Rights—older than our political parties, older than our school system" the Court rejected the notion that the government could enter that zone in the manner that the Connecticut statute would require. *Id.* at 486. See also *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967) and cases cited therein.

9. Comment, *supra* note 1, at 214.

10. *N.Y.U. Note, supra* note 4, at 144, citing HEARING ON MARITAL AND FAMILY VIOLENCE BEFORE THE SEN. SUBCOMM. ON NUTRITION AND HUMAN NEEDS OF THE CAL. SEN. HEALTH AND WELFARE COMM. 81 (July 21, 1975) (Statement of M. Vail).

11. *Self Defense Plea, supra* note 5, at 36. According to the 1974 Uniform Crime Report, 149 officers lost their lives responding to domestic violence calls between 1965 and 1974. Note, *supra* note 1, at 215, citing L.A. Times, Feb. 20, 1978, Part IV, at 1, col. 2. Twenty-seven percent of all police deaths resulted from responding to such calls. Note, *supra*, at 215. See also *N.Y.U. Note, supra* note 4, at 144.

12. *Self Defense Plea, supra* note 5, at 36. "[V]ague standards for arrest, the low percentage of arrests which result in convictions, and the fact that battered women may not pursue their cases once charges have been filed" are used as justification for refusal to arrest by police officers called to the scene of wife abuse. *N.Y.U. Note, supra* note 4, at 146-47. In addition, law enforcement officers reason that a battering husband, arrested and later released on bail, is likely to return and do more serious harm to his wife in retaliation for his arrest. Note, *supra* note 1, at 215.

Thus, while our criminal laws promise protection from unjustifiable infliction of injury by others,¹³ that promise may well ring hollow to an abused wife. Faced with such adverse circumstances, many battered women perceive no way to escape, as they generally are dependent upon their batterers economically and psychologically.¹⁴ Discouraged about the possibility of finding protection under the law,¹⁵ and convinced of their inability to escape,¹⁶ some battered women are standing their ground and striking back.¹⁷ While the law specifically,

The Ann Arbor, Michigan Police Training Academy recommends the following procedure for domestic calls:

- a. Avoid arrest if possible. Appeal to vanity.
- b. Explain the procedure of obtaining a warrant.
 1. Complainant must sign complaint.
 2. Must appear in court.
 3. Consider loss of time.
 4. Cost of court.
- c. State that your only interest is breach of peace.
- d. Explain that attitudes usually change by court time.
- e. Recommend a postponement.
 1. Court not in session.
 2. No judge available.
- f. Do not be too harsh or critical.

Self Defense Plea, *supra* note 5, at 36.

While this procedure represents the general attitude toward domestic disputes, it must be noted that some changes have been made. For example, the International Association of Chiefs of Police formerly classified "most family disputes [as] 'personal matters requiring no direct action'" and identified officers' sole purpose once inside the home as that of preserving the peace. *N.Y.U. Note*, *supra* note 4, at 145 (citations omitted). The Association now suggests that police "treat battered wives as victims of crime and husbands as violent law-breakers." *Id.* In Chicago, police guidelines limit officer discretion in domestic violence cases. Under the guidelines, various aggravating factors—any use of a weapon, any intentionally inflicted serious injury, and any prior injury, court appearance or calls to the police—require immediate arrest." *Meyers*, *supra* note 4, at 49.

13. See W. LAFAYE & A. SCOTT, *HANDBOOK ON CRIMINAL LAW* (1972). The authors explain: "The protections afforded by the criminal law to the various interests of society against harm [include] protection from physical harm to the person." *Id.* at 21.

14. *Self Defense Plea*, *supra* note 5, at 36, 41. According to the author, "[m]ost women in that position simply feel imprisoned. The man's physical, financial, and social advantage has convinced her it is not only impossible but immoral to escape his brutality." *Id.* at 41. See also Note, *supra* note 1, at 219; notes 31-55 and accompanying text *infra*.

15. See notes 5-14 and accompanying text *supra*.

16. See notes 14 *supra*; 38-55 and accompanying text *infra*.

17. *Self Defense Plea*, *supra* note 5, at 41; *Representation of Women*, *supra* note 1, at 149; Note, *supra* note 1, at 219. Detroit Police Commander James D. Bannon commented, "You can readily understand why some women ultimately take the law into their own hands." *Self Defense Plea*, *supra*, at 36. Commander Bannon observes as well that it is understandable for the male to feel "protected by the system in his use of violence." *Id.*

and society in general, have offered little help to the battered wife,¹⁸ and indeed may be partially responsible for the actions of those who strike back violently,¹⁹ many of these women now face homicide charges brought by that same society and its legal system.²⁰

This comment will focus on the legal controversy surrounding this emerging phenomenon, analyzing particularly how Pennsylvania's criminal law might accommodate a homicide defense based on the Battered Spouse Syndrome.²¹ To most effectively frame the problem for analysis, three hypothetical situations, representing typical battered spouse factual contexts, will be set out.²² The law of homicide in Pennsylvania will then be applied to each situation, both with and without introduction of the Battered Spouse Syndrome as a possible defense.²³

II. THREE REPRESENTATIVE HYPOTHETICAL SITUATIONS

Hypothetical 1

Archie and Alice had been married for fifteen years. Almost from the start, Archie beat Alice with some regularity, sexually abusing her at times and subjecting her to degradation and insults. Archie had also abused their young child and threatened to kill both Alice and their daughter. Archie exercised increasing control over Alice's life, driving her friends away, making her stop working and eventually forbidding her to have any outside social contacts without him. Alice tried leaving Archie, but he found her and threatened her life if she refused to come back. He told her that she and their child would never be free of him.

One night, after a particularly savage beating, Alice waited until Archie fell asleep, got a knife from the kitchen, and repeatedly stabbed Archie, killing him.

Hypothetical 2

Bill and Barbara got married right after high school. A former football player, Bill worked as a laborer and was proud that he had remained in good physical shape. At six foot-three Bill was a foot taller than Barbara and weighed almost 100 pounds more than she. When Bill was sober, he and Barbara had a good relationship. But Bill tended to drink too much, and when he did, he slapped Barbara around. Toward the end, Bill had been getting drunk more often and the beat-

18. See notes 5-14 and accompanying text *supra*.

19. See notes 13-17 and accompanying text *supra*.

20. See notes 56-60 and accompanying text *infra*.

21. For a description of the Battered Spouse Syndrome, see notes 24-56 and accompanying text *infra*.

22. See Part II *infra*.

23. See notes 151-228 and accompanying text *infra*.

ings had become more severe. Although he had never attacked her with other than his bare hands, Bill had sent Barbara to the hospital more than once—the last time with a concussion, cracked ribs and loose teeth. The scenario was always the same: Bill came home drunk and began insulting Barbara, the insults turned into threats, and the beating followed.

When Bill came home drunk the last time and began insulting Barbara, she reached across the kitchen counter for the knife she had been using and the first time he came toward her, she stabbed Bill in the chest, killing him.

Hypothetical 3

Carl had always been an unreasonably jealous husband. In the five years that he and Cathy were married, he had constantly accused her of being unfaithful. His accusations were generally accompanied by threats and physical violence, which seemed to be getting worse with each incident. Carl was convinced that the baby Cathy was carrying was not his and had threatened to do away with it and with her.

One night following a particularly ugly insult session, Carl began beating Cathy, this time delivering many blows to her abdomen and renewing his threats against the unborn child. Breaking away from him momentarily, Cathy lunged for the drawer in her night stand where she had placed a kitchen knife after the last beating. She turned and stabbed Carl six times, killing him.

III. THE BATTERED SPOUSE SYNDROME

"Women have always had to defend themselves against physical and sexual assaults by their husbands, lovers [and] friends," notes one commentator.²⁴ What goes on behind closed doors, in the judicially protected privacy of the family home,²⁵ is often clearly criminal conduct.²⁶ Wife beating does not represent merely isolated, unconnected incidents, but rather "reflects a societal pattern of male violence against women."²⁷

24. *Representation of Women*, *supra* note 1, at 141.

25. See notes 8 & 10 and accompanying text *supra*.

26. *Self Defense Plea*, *supra* note 5, at 35.

27. *Meyers*, *supra* note 4, at 50. See *Bruno v. Codd*, 90 Misc. 2d 1047, 396 N.Y.S.2d 974 (Sup. Ct. 1977). In this action, battered wives brought suit, seeking declaratory and injunctive relief against the New York City Police Department, Family Court and Probation Department. *Id.* at 1048, 396 N.Y.S.2d at 976. The plaintiffs alleged that these three agencies were responsible for their injuries and that the agencies had neglected their duties to battered spouses. *Id.* at 1048-49, 1052, 396 N.Y.S.2d at 976-77, 979. The New York County Supreme Court dismissed the defendants' motion for summary judgment, finding that the plaintiffs had stated a cause of action. *Id.* at 1051-53,

Two patterns of domestic violence have been identified by one researcher:²⁸ the Saturday Night Brawl²⁹ and the Chronic Battering Syndrome.³⁰ The former involves violent confrontations, often initiated and generally welcomed by the victim.³¹ In contrast, victims of the Chronic Battering Syndrome, or Battered Spouse Syndrome, do *not* precipitate the violence, but rather seek to avoid the confrontation and during its course remain passive, trying to protect themselves or to escape.³² They feel powerless and fear that they will be killed.³³ It is the Chronically Battered Spouse that is the key character in this comment.

One might ask why women, confronted with recurring violent attacks, remain with their attackers. Some commentators suggest that the women stay because of masochistic tendencies—that, despite their protests, they enjoy the assaults.³⁴ Such theories, however, have been criticized for their superficiality and are being disproved by research.³⁵ Other theories propose that the women who stay with battering spouses do so because they fear reprisals,³⁶ love the batterer and believe his promises of reform,³⁷ or lack reasonable alternatives.³⁸ Another expla-

396 N.Y.S.2d at 977-79. Subsequently, the police department settled with the plaintiffs and signed a consent order. *Bruno v. Codd*, 64 A.D.2d 582, 582-83, 407 N.Y.S.2d 165, 66-67 (1978), *aff'd*, 47 N.Y.2d 582, 393 N.E.2d 976, 419 N.Y.S.2d 901 (1979). The Probation Department and Family Court appealed the Supreme Court decision, and the Appellate Division granted their motions for dismissal and summary judgment. 64 A.D.2d at 582-83, 407 N.Y.S.2d at 167-68. The Court acknowledged the serious problem of spouse abuse, but found that the plaintiffs' relief lay with the appropriate supervisory agencies and that judicial intervention would represent an invasion of executive authority. *Id.* at 583, 407 N.Y.S.2d at 167. Judge Murphy dissented, finding that the complaint did state a basis for relief founded on discriminatory enforcement of the law. *Id.* at 583, 407 N.Y.S.2d at 168 (Murphy, J., dissenting).

28. See Steinmetz, *supra* note 4.

29. *Id.* at 323-26. See note 31 and accompanying text *infra*.

30. Steinmetz, *supra* note 4, at 326. This Comment will use "Battered Spouse Syndrome" to refer to what Dr. Steinmetz labels "Chronic Battered Syndrome." See notes 32-33 and accompanying text *infra*.

31. Steinmetz, *supra* note 4, at 323. Either spouse is likely to initiate the battle on any given occasion. *Id.* The author quotes some women involved in the Saturday Night Brawl situation as commenting: "I'd keep at him until he reached his breaking point . . . Making up is so much fun after we fight . . . I deserve it, I started the argument." *Id.* at 324 (citations omitted).

32. *Id.* at 324.

33. *Id.*

34. Note, *Does Wife Abuse Justify Homicide?*, 24 WAYNE L. REV. 1705, 1709 (1978), citing Snell, Rosenwald & Robey, *The Wifebeater's Wife*, 11 ARCH. GEN. PSYCH. 107, 111 (1964).

35. *N.Y.U. Note, supra* note 4, at 141-42. See notes 41-55 and accompanying text *infra*.

36. *Self Defense Plea, supra* note 5, at 36, 41; *N.Y.U. Note, supra* note 4, at 140.

37. Meyers, *supra* note 4, at 49; *N.Y.U. Note, supra* note 4, at 140.

38. Meyers, *supra* note 4, at 48; *Self Defense Plea, supra* note 5, at 36, 41; *N.Y.U. Note, supra* note 4, at 140-41.

nation posits a dehumanizing process in which the woman is stripped of her independence and the sense of self worth and is made to feel guilty and deserving of the beatings she receives.³⁹ A similar theory traces the woman's failure to leave as owing to a pattern of compliance brought on by an unstable sense of self and a resulting need to please in order to feel worthwhile.⁴⁰ While some analysts feel that the average battered spouse exhibits certain inherent psychological characteristics which make her more compliant in the face of such violence and thus more likely to end up in a battering relationship,⁴¹ others argue that the dynamics of domestic violence *produce* those characteristics and will do so in virtually any subject.⁴²

One researcher suggests that the psychological effects of the Battered Spouse Syndrome can be compared to classic brainwashing.⁴³ Characteristics identified as the cornerstones of brainwashing⁴⁴ are also key factors identifiable in the Syndrome.⁴⁵ Fear, created by the husband's threats and violence, produces hyper-suggestibility.⁴⁶ This condition is intensified by isolation,⁴⁷ which may be either self-imposed by a woman who is embarrassed by her husband's actions,⁴⁸ or enforced by the husband, who might insult his wife's friends, physically bar their entrance, and prevent his wife from going anywhere without him.⁴⁹ Guilt adds to the effectiveness of the brainwashing.⁵⁰ The husband accuses his wife, generally of infidelity, and makes her feel guilty, thus convincing her that she deserves the beatings.⁵¹ The combination of fear, isolation and guilt

39. *Self Defense Plea*, *supra* note 5, at 36, 41; *N.Y.U. Note*, *supra* note 4, at 140.

40. Meyers, *supra* note 4, at 48.

41. *Id.*

42. Steinmetz, *supra* note 4, at 326.

43. *Id.* at 327. Dr. Steinmetz explains:

Brainwashing is made possible by isolating individuals from the supports and rewards of their previous *milieu*. This isolation results in hypersuggestibility and increased receptivity to reinforcement of new values and behaviors. The only validation of the person's worth is that offered by the individuals enforcing the isolation. Inconsistent, confusing, threatening treatment, interspersed with kindness, produces an effect similar to the submissive, overdependent behavior exhibited by a child of inconsistent parents.

Id.

44. *Id.*

45. *Id.* at 328-30.

46. *Id.* at 328. See note 43 *supra*.

47. *Id.*

48. *Id.* at 328-29.

49. *Id.* at 329.

50. *Id.*

51. *Id.*

yields yet another element of brainwashing—emotional dependency.⁵² Stripped of her sense of self-worth, of external support, and of personal confidence, the woman becomes totally dependent upon her attacker.⁵³ Lack of support from family and professional agencies, evidenced by frequent suggestions to “give it one more try,” further aggravates the victim’s deteriorating psychological condition, reinforcing her negative estimate of her self worth, and underscoring her belief that she *should not* and *can not* escape.⁵⁴ The brainwashing is a success.⁵⁵

Frustration and lack of recourse have created a situation in which abused women see their only alternatives as submitting to an intolerable life style, or striking back themselves.⁵⁶ Ironically, the same courts and legal system that have failed to offer the battered spouse protection from her assailant will prosecute her for responding in what she perceives to be the only way available.⁵⁷ Women traditionally have lost both their physical battles and legal battles in this area.⁵⁸ The woman who strikes back, killing her attacker, will be confronted with a homicide charge. Most often, those charged have pleaded either guilty, or not guilty by reason of insanity.⁵⁹ In either case, such women are routinely found to have committed unjustifiable acts of homicide.⁶⁰ Some of these women, however, are now stepping forward and telling the whole story—revealing the circumstances leading to their actions and asserting a right of self defense corresponding to that of men.⁶¹ As a result, juries in some well-publicized cases have found that the conduct of these women may not in fact be murder at all, but rather a justified, excusable, or at least not culpable response to the situation perceived by a battered spouse.⁶²

52. *Id.*

53. *Id.* One battered wife explained: “You put up with six days of beating because there is one good day to have someone to share things with . . .” *Id.*

54. *Id.* at 330-31.

55. *Id.* at 332.

56. *Self Defense Plea*, *supra* note 5, at 34-35; *Representation of Women*, *supra* note 1, at 149.

57. *Self Defense Plea*, *supra* note 5, at 35.

58. *Id.*

59. *Representation of Women*, *supra* note 1, at 141.

60. *Id.*

61. *Id.* For a discussion of possible equal protection problems with self defense doctrines as currently applied, *see* notes 149-51 and accompanying text *infra*.

62. *See Self Defense Plea*, *supra* note 5, at 34. The authors describe a Michigan case where the defendant battered spouse, who had ignited gasoline which she had poured around her sleeping husband, was acquitted by reason of temporary insanity; and a California case where a wife charged with her husband’s murder was acquitted when the jury found her action to be self defense because of her husband’s continual beatings. *Id.* *See also* Meyers, *supra* note 4, at 47.

IV. CRIMINAL HOMICIDE IN PENNSYLVANIA

Society does not punish all killings. Rather, certain killings are excused as justified,⁶³ and others as accidental.⁶⁴ Punishable killings constitute a "class of offenses, graded according to the mental state and moral turpitude of the defendant."⁶⁵

Under Chapter 25 of the Pennsylvania Crimes Code, a person who "intentionally, knowingly, recklessly, or negligently causes the death of another human being" commits criminal homicide.⁶⁶ An act, satisfying

63. *Commonwealth v. Mahoney*, 460 Pa. 201, 205, 331 A.2d 488, 490 (1975); W. LAFAVE & A. SCOTT, *supra* note 13, at 391-98. See *Representation of Women*, *supra* note 1, at 149, which summarizes justifiable homicides stating: "Persons who kill in defense of their own lives, [or] the lives of others . . . are entitled to a determination that the killing was justifiable." *Id.* For a discussion of justifiable homicide in Pennsylvania, see notes 135-51 and accompanying text *infra*.

64. W. LAFAVE & A. SCOTT, *supra* note 13, at 587.

65. *Representation of Women*, *supra* note 1, at 149. See also *Commonwealth v. Polimeni*, 474 Pa. 430, 378 A.2d 1189 (1977); *Commonwealth v. Moore*, 463 Pa. 317, 344 A.2d 850 (1975). The classifications of homicide codified in the Pennsylvania Crimes Code were discussed and compared at length in a 1977 decision in which the Supreme Court of Pennsylvania stated:

The differences between the classifications are largely a function of the state of mind of the perpetrator. This becomes clear when one examines the ranking for culpability purposes of the several categories of criminal homicide. Premeditated, intentional killing . . . continue[s] to be . . . the most highly culpable [class] of criminal homicide. A felonious and malicious killing *without* a specific intent to take life (murder of the third degree, formerly second degree) is placed by the Code in the next highest degree of culpability, a felony of the first degree. Next in seriousness is a killing which, although intentional, is committed when the actor is under the influence of a sudden and intense passion resulting from serious provocation or is acting in the unreasonable belief that the circumstances would justify a killing. This subdivision of criminal homicide, voluntary manslaughter, is punishable as a felony of the second degree. Involuntary manslaughter . . . is committed when the death of a person is caused as a direct result either of an [*sic*] lawful act or of an unlawful act done in a "reckless or grossly negligent manner." In the scale of culpability, such a killing is a misdemeanor of the first degree.

Commonwealth v. Polimeni, 474 Pa. 430, 440-41, 378 A.2d 1189, 1195 (1977) (citations omitted) (emphasis in original).

66. 18 PA. CONS. STAT. ANN. § 2501 (Purdon 1973). The Pennsylvania Legislature has statutorily defined the mental elements of criminal homicide as follows:

(1) A person acts intentionally with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

(2) A person acts knowingly with respect to a material element of an offense when:

this general definition of criminal homicide, is then classified,⁶⁷ based on the defendant's state of mind at the time of the killing,⁶⁸ as involuntary manslaughter,⁶⁹ voluntary manslaughter,⁷⁰ or murder.⁷¹ Similarly, murder is further subdivided into murder of the first, second and third degrees.⁷²

A. Murder

"Analysis demonstrates . . . that the . . . classifications of states of mind are not neat pigeon holes." ⁷³ To raise homicide to the level of murder, it is essential that the killing be done with malice, in the legal sense of the word.⁷⁴ Malice has been said to consist

either of an express intent to kill or inflict great bodily harm, or of a "wickedness of disposition, hardness of heart, cruelty, recklessness of consequences and a mind regardless of social

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct he is aware that it is practically certain that his conduct will cause such a result.

(3) A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

(4) A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor's failure to perceive it, considering the nature and intent of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor's situation.

18 PA. CONS. STAT. ANN. § 302(b) (Purdon 1973).

67. 18 PA. CONS. STAT. ANN. § 2501(b) (Purdon 1973).

68. Referring to the state of mind classifications, Justice Roberts of the Pennsylvania Supreme Court has said: "The differences between the several degrees of homicide are differences in the state of mind of the defendant at the time of the killing." *Commonwealth v. Moore*, 463 Pa. 317, 329, 344 A.2d 850, 856 (1975) (Roberts, J., concurring).

69. 18 PA. CONS. STAT. ANN. § 2504 (Purdon 1973). Involuntary manslaughter will not be discussed further as its unintentional nature places it outside the scope of this comment which will focus on intentional killing. See notes 1-3, 15-17 & 56-60 and accompanying text *supra*.

70. 18 PA. CONS. STAT. ANN. § 2503 (Purdon 1973).

71. 18 PA. CONS. STAT. ANN. § 2502 (Purdon Supp. 1980-1981).

72. *Id.*

73. *Commonwealth v. Moore*, 463 Pa. 317, 329, 344 A.2d 850, 856 (1975) (Roberts, J., concurring).

74. *Commonwealth v. Carter*, 481 Pa. 495, 498-99, 393 A.2d 13, 15 (1978); *Commonwealth v. Thompson*, 466 Pa. 15, 19, 351 A.2d 280, 282 (1976).

duty" indicating an unjustified disregard for the probability of death or great bodily harm and an extreme indifference to the value of human life.⁷⁵

The element of malice may be understood by examining the description given to three⁷⁶ of the four types of common law homicide traditionally characterized as murder—intent-to-kill murder,⁷⁷ intent-to-do-serious bodily-injury murder,⁷⁸ and depraved heart murder.⁷⁹ From these labels it becomes clear that malice refers not to ill-will or bad feeling, but rather to a level of intention or purpose regarding the ultimate death of another.

Determination of the existence of malice, because it requires discerning a mental state, is a difficult task, but the courts have approved certain general approaches.⁸⁰ Malice may be inferred from the circumstances surrounding a killing,⁸¹ and may properly be presumed when a deadly weapon is directed at any vital part of the human body.⁸² An instrument not ordinarily considered deadly may be so found when it is used to kill.⁸³

75. *Commonwealth v. Taylor*, 461 Pa. 557, 559, 337 A.2d 545, 546 (1975), quoting *Commonwealth v. Boyd*, 461 Pa. 17, 22-23, 334 A.2d 610, 613 (1975).

76. The fourth type, felony murder, refers to an unintended death brought about during the commission or attempted commission of a felony, and is not relevant to the discussion at hand. See W. LAFAVE & A. SCOTT, *supra* note 13, at 545.

77. *Id.* at 530. "Intent-to-kill" murder involves an actor who sets out with the specific purpose of taking a life, and actually accomplishes this end. *Id.* at 535.

78. *Id.* at 530. "Serious bodily harm" murder involves a conscious purpose of doing grave harm, but without the purpose of necessarily causing death. When a person acts with this state of mind and his acts result in another's death, he or she is said to have committed serious bodily harm murder. *Id.* at 540.

79. *Id.* at 530. LaFave & Scott define depraved heart murder as involving "[e]xtremely negligent conduct, which creates what a reasonable man would realize to be . . . a very high risk of death or serious bodily injury to another or others" *Id.* at 541.

80. See notes 81-83 and accompanying text *infra*.

81. *Commonwealth v. Taylor*, 461 Pa. 557, 560, 337 A.2d 545, 546 (1975), quoting *Commonwealth v. Boyd*, 461 Pa. 17, 22, 334 A.2d 610, 613 (1975). The Pennsylvania Supreme Court explained this concept in a subsequent decision in which it noted that, "[b]ecause a state of mind by its very nature is subjective, absent a declaration by the actor himself we can only look to the conduct and the circumstances surrounding it to determine the mental state which occasioned it." *Commonwealth v. O'Searo*, 466 Pa. 224, 238, 352 A.2d 30, 37 (1976). The court has justified the validity of looking to the conduct and circumstances by pointing to the general proposition that a person is presumed to know and intend the probable results of his actions. *Id.*

82. *Commonwealth v. Carter*, 481 Pa. 495, 499, 393 A.2d 13, 15 (1978); *Commonwealth v. O'Searo*, 466 Pa. 224, 238, 352 A.2d 30, 36 (1976).

83. *Commonwealth v. Prenni*, 357 Pa. 572, 575, 35 A.2d 532, 533 (1947) (an ax, a baseball bat, an iron bar, and even a bedroom slipper have been held to be deadly weapons when used in a killing).

Once the presence of malice establishes a homicide as murder, further classification occurs. In Pennsylvania, murder itself is broken down into three levels, based on culpability: murder of the first, second and third degrees.⁸⁴ For the purposes of this Comment, only murder of the first degree and murder of the third degree will be considered.⁸⁵

The statute describes murder of the first degree as "an intentional killing,"⁸⁶ and murder of the third degree as "[a]ll other kinds of murder"⁸⁷ Attempting to clarify the difference, the statute further defines intentional killing as "[k]illing by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing."⁸⁸ In wrestling with the somewhat elusive difference in degrees, courts have often turned to the phrase "specific intent," stating that the existence of a specific intent to kill distinguishes murder of the first degree from murder of the third degree.⁸⁹ The courts reason that such intent includes the requisite element of premeditation.⁹⁰ On

84. 18 PA. CONS. STAT. ANN. § 2502 (Purdon Supp. 1980-1981). See *Commonwealth v. Polimeni*, 474 Pa. 430, 439, 378 A.2d 1189, 1194 (1977).

85. Murder of the second degree, commonly referred to as felony murder, is described as an unintentional criminal homicide which was "committed while defendant was engaged as a principal or an accomplice in the perpetration of a felony." 18 PA. CONS. STAT. ANN. § 2502(b) (Purdon Supp. 1980-1981). Further discussion of murder in the second degree is not within the scope of this Comment.

86. 18 PA. CONS. STAT. ANN. § 2502(a) (Purdon Supp. 1980-1981).

87. *Id.* § 2502(c).

88. *Id.* § 2502(d).

89. *Commonwealth v. Robinson*, 468 Pa. 575, 581-83, 364 A.2d 665, 669 (1976); *Commonwealth v. O'Searo*, 466 Pa. 224, 235, 352 A.2d 30, 35-36 (1976). It should be noted that these cases arose under the Pennsylvania Crimes Code as it existed prior to amendments which broke murder down into three, rather than two, degrees. Prior to the amendments, murder of the first degree included both felony murder and intentional killing, while murder of the second degree included all other kinds of murder. See PA. STAT. ANN. tit. 18, § 2502 (Purdon 1973) (current version at 18 PA. CONS. STAT. ANN. § 2502 (Purdon Supp. 1980-1981)). The new Code has simply given felony murder its own degree, and moved old murder of the second degree to murder of the third degree. See *Commonwealth v. Polimeni*, 474 Pa. 430, 439, 378 A.2d 1189, 1194 (1977). In *Polimeni*, the Pennsylvania Supreme Court explained that:

Murder of the first degree and of the second degree under the Crimes Code together correspond to murder in the first degree under prior law; the new murder of the first degree is an intentional killing, while the new murder of the second degree is felony-murder. Murder of the third degree is comprised of "all other kinds of murder", 18 Pa. C.S. § 2502(c) (Supp. 1977-1978), thus taking the place of the former murder in the second degree, which the Penal Code described in the same words.

Id. Thus, for purposes of discerning the distinction between the new grades of first degree murder and third degree murder, analyses of the differences between old first degree—*intentional* murder not felony murder—and old murder of the second degree have been used.

90. *Commonwealth v. Robinson*, 468 Pa. 575, 581-83, 364 A.2d 665, 669 (1976). The Supreme Court of Pennsylvania has stated that "[o]ur cases have consistently held that the requirement of premeditation and deliberation is met

the other hand, the prosecution must prove only intent to inflict grievous bodily harm to support a conviction for murder of the third degree.⁹¹ This lesser degree of murder requires an unlawful killing with malice, but without the specific and premeditated intention of taking a life.⁹²

While it is tempting to seize upon the statutory language of premeditation and assume that it requires there to be some evidence of design or plan in order to establish murder of the first degree, it should be noted that in Pennsylvania, premeditation may be found whenever a showing is made that there exists a conscious purpose to bring about death,⁹³ and that such a purpose may be found to have been formulated in a fraction of a second.⁹⁴ The courts have held that, as with legal malice,⁹⁵ specific intent to kill may be inferred from the intentional use of a deadly weapon on a vital part of the body.⁹⁶ The law on this double inference is not altogether clear, however, as is pointed out by Justice Manderino's vigorous dissent in *Commonwealth v. O'Searo*.⁹⁷ He maintained that, while the drawing of an inference that use of a deadly weapon on a vital part of the body supports a finding of intent

whenever there is conscious purpose to bring about death." *Commonwealth v. O'Searo*, 466 Pa. 224, 239, 352 A.2d 30, 37 (1976).

91. *Commonwealth v. Garcia*, 474 Pa. 449, 463-64, 378 A.2d 1199, 1206-07 (1977).

92. *Commonwealth v. Carter*, 481 Pa. 495, 498-99, 393 A.2d 13, 15 (1978).

93. *Commonwealth v. O'Searo*, 466 Pa. 224, 239-40, 352 A.2d 30, 37-38 (1976). Specifically, the court in *O'Searo* stated:

The term "specific intent-to-kill" is a phrase that has been developed by the courts of this jurisdiction to express the state of mind which characterizes the intent which accompanies a killing which was willful, deliberate and premeditated as required by the statute. . . . "Such intent supplies the qualities of willfulness, deliberation and premeditation otherwise essential, by the statute, to murder in the first degree."

Id. at 234-35, 352 A.2d at 35, quoting *Commonwealth v. Jones*, 355 Pa. 522, 525-26, 50 A.2d 317, 319 (1947) (emphasis added).

94. *Commonwealth v. Drum*, 58 Pa. 9, 16 (1868).

The law fixes upon no length of time as necessary to form the intention to kill, but leaves the existence of a fully formed intent as a fact to be determined by the jury. . . . "[i]t is equally true both in fact and from experience that no time is too short for a wicked man to frame in his mind his scheme of murder, and to contrive the means of accomplishing it." But this expression must be qualified, lest it mislead "[I]his suddenness is opposed to premeditation, and a jury must be well convinced upon the evidence that there was time to deliberate and premeditate. The law regards, and the jury must find, the actual intent; that is to say, the fully formed purpose to kill, with so much time for deliberation and premeditation, as to convince them . . . that the mind has become fully conscious of its own design.

Id., quoting Judge Rush in the early case of *Commonwealth v. Richard Smith* (emphasis in original).

95. See notes 80-83 and accompanying text *supra*.

96. *Commonwealth v. O'Searo*, 466 Pa. 224, 236, 352 A.2d 30, 36 (1976).

97. 466 Pa. 224, 241-44, 352 A.2d 30, 38-40 (1976) (Manderino, J., dissenting).

to kill for the purpose of classifying a homicide as murder,⁹⁸ the inference that such conduct also shows the specific intent necessary to support a charge of first degree murder is not permissible.⁹⁹ He contended that the cases relied upon by the *O'Searo* majority¹⁰⁰ actually involved a finding, apart from the use of the deadly weapon, that "the defendant not only intended to kill, but had time for willful, deliberate, and premeditated reflection" ¹⁰¹ Despite Justice Manderino's criticism, however, and over his continuing dissents,¹⁰² the Pennsylvania Supreme Court has consistently stated the law as allowing both inferences from the use of a deadly weapon on a vital part of the body.¹⁰³ It must be noted, however, that, while this inference of specific intent is permissible, it is by no means mandatory.¹⁰⁴

Additionally, it is the *actual* presence or absence of the clear, conscious purpose of taking a life which is controlling.¹⁰⁵ Therefore, in *Commonwealth v. Stewart*,¹⁰⁶ the court allowed the jury to consider evidence of the ferocity and viciousness of gang wars in the weeks preceding the defendant's act of homicide, introduced by the defendant to establish that, at the time of the killing, he was in such a terror-stricken panic as to negate the existence of reflection and conscious purpose necessary to sustain a conviction of first degree murder.¹⁰⁷ Additionally, in *Commonwealth v. Walzack*,¹⁰⁸ the Pennsylvania Supreme Court first admitted

98. *Id.* at 241, 352 A.2d at 38 (Manderino, J., dissenting).

99. *Id.* at 241-42, 352 A.2d at 38-39 (Manderino, J., dissenting).

100. *Id.* at 242-43, 352 A.2d at 39 (Manderino, J., dissenting).

101. *Id.*

102. See, e.g., *Commonwealth v. Williams*, 483 Pa. 293, 301-02, 396 A.2d 1177, 1181 (1978) (Manderino, J., dissenting); *Commonwealth v. Jackson*, 481 Pa. 426, 435, 392 A.2d 1366, 1370 (1978) (Manderino, J., dissenting); *Commonwealth v. Kingsley*, 480 Pa. 560, 579, 391 A.2d 1027, 1037 (1978) (Manderino, J., dissenting).

103. See, e.g., *Commonwealth v. Williams*, 483 Pa. 293, 297, 396 A.2d 1177, 1179 (1978); *Commonwealth v. Jackson*, 481 Pa. 426, 430-31, 392 A.2d 1366, 1368 (1978); *Commonwealth v. Kingsley*, 480 Pa. 560, 570, 391 A.2d 1027, 1032 (1978).

104. *Commonwealth v. O'Searo*, 466 Pa. at 239, 352 A.2d at 37.

105. *Commonwealth v. Stewart*, 461 Pa. 274, 279, 336 A.2d 282, 285 (1975).

106. 461 Pa. 274, 336 A.2d 282 (1975).

107. *Id.* at 282-83, 336 A.2d at 285. The court held that the lower court erred in barring evidence of the viciousness of previous gang fights which had been offered to substantiate the defendant's claim that terror-stricken panic, induced by his knowledge of these past events, prevented the sort of reflection and conscious purpose necessary for conviction of first degree murder. *Id.* at 282, 336 A.2d at 286. The defendant attempted to introduce evidence that gang shootings had been frequent during the weeks preceding the incident, that street gang members often carried deadly weapons into battles, and that the defendant had once been hospitalized as a result of an injury received in a street fight. *Id.*

108. 468 Pa. 210, 360 A.2d 914 (1976).

expert psychological testimony to determine the defendant's capacity to formulate the specific intent necessary for a conviction of murder of the first degree.¹⁰⁹

While distinctions between the degrees of murder may be less than clear, they are, without question, critically important, since they will control the penalties imposed upon a convicted defendant.¹¹⁰ While murder of the first degree is punishable by sentences of life imprisonment or death,¹¹¹ murder of the third degree carries a maximum sentence of twenty years imprisonment.¹¹²

B. Voluntary Manslaughter

Less serious than murder in terms of culpability and punishment is voluntary manslaughter.¹¹³ A person who kills another without lawful justification "commits voluntary manslaughter if at the time of the killing, he is acting under a sudden and intense passion resulting from serious provocation,"¹¹⁴ or with the unreasonable belief that the killing

109. *Id.* at 212-13, 360 A.2d at 915. In *Walzack*, the court heard testimony to the effect that, as a result of a frontal lobotomy, the defendant did not possess sufficient mental capacity to formulate specific intent to kill. *Id.* at 215, 360 A.2d at 916. Justice Eagen dissented in *Walzack*, essentially because of his distrust of the reliability of psychological evidence. *Id.* at 224-26, 360 A.2d at 921-22 (Eagen, J., dissenting).

110. See 18 PA. CONS. STAT. ANN. § 1102(a) (Purdon Supp. 1980-1981) (sentence for first degree murder); § 2502(c) (defining third degree murder as a first degree felony); *id.* § 1103(1) (sentence for a first degree felony).

111. 18 PA. CONS. STAT. ANN. § 1102(a) (Purdon Supp. 1980-1981). Determination of which of the two statutorily provided penalties will be imposed is reserved until after a sentence hearing at which the jury that convicted the defendant hears evidence of aggravating or mitigating circumstances. *Id.* § 1311. Aggravating circumstances include a showing that the victim was a public official performing his duty, the murder involved a contract killing, the victim was a prisoner or hostage of the defendant, the victim was a prosecution witness killed in an attempt to prevent testimony, or that the offense was committed by torture. *Id.* § 1311(d). Among the mitigating circumstances are the fact that the defendant was under the influence of extreme mental disturbance, could not appreciate the criminality of his conduct, or acted under duress; the fact that the victim participated in the homicidal act; or any other evidence of mitigation concerning the character and record of the defendant or the circumstances of the killing. *Id.* § 1311(e). After hearing the evidence, the jury must decide unanimously on a sentence. *Id.* § 1311(a)(4). If the sentence is death, the jury must set forth the findings upon which it is based. *Id.* § 1311(f)(1).

112. Murder of the third degree constitutes a felony of the first degree. 18 PA. CONS. STAT. ANN. § 2502(c) (Purdon Supp. 1980-1981). The maximum penalty for a first degree felony is 20 years in prison. *Id.* § 1103(1).

113. Voluntary manslaughter is classified as a felony of the second degree. 18 PA. CONS. STAT. ANN. § 2503(c) (Purdon 1973). This lesser degree of felony is punishable by imprisonment for not more than 10 years. *Id.* § 1103(2).

114. *Id.* § 2503(a). See *Commonwealth v. Polimeni*, 474 Pa. 430, 441, 378 A.2d 1189, 1195 (1977). In an effort to clarify the rationale said to underlie the heat of passion rule, the Supreme Court of Pennsylvania has said: "In murder, the intent to kill is the product of reflection, in voluntary manslaughter the conduct is inspired by passion resulting from sufficient legal provocation." *Commonwealth v. O'Searo*, 466 Pa. at 240 n.6, 352 A.2d at 38 n.6.

is justified.¹¹⁵ Provocation must be found to be adequate to reduce murder to voluntary manslaughter.¹¹⁶ The general test for adequacy is an objective test,¹¹⁷ specifically, "whether a reasonable man, confronted with this series of events became impassioned to the extent that his mind was 'incapable of cool reflection.'"¹¹⁸ Adequate provocation, however, is not restricted to a response to one event, and may be established by the cumulative impact of a series of occurrences,¹¹⁹ with psychological testimony as to the effect of the cumulation of events being admissible.¹²⁰

However, cumulative effect must be distinguished from reliance on past events to excuse a homicide where in fact extreme passion, resulting from the event or events, cannot be shown to exist at the time of the

115. 18 PA. CONS. STAT. ANN. § 2503(b) (Purdon 1973). The statute designates a homicide as voluntary manslaughter if the accused, at the time he knowingly or intentionally inflicts the mortal wound, believes the circumstances to be such that they would justify the killing, but his belief is unreasonable. *Id.* See *Commonwealth v. Polimeni*, 474 Pa. 430, 441, 378 A.2d 1189, 1195 (1977).

116. *Commonwealth v. Whitfield*, 475 Pa. 297, 304, 380 A.2d 362, 366 (1977); *Commonwealth v. Drum*, 58 Pa. 9, 17 (1868) (insulting or scandalous words not sufficient provocation, nor are actual indignities to the person of a light and trivial kind).

117. 18 PA. CONS. STAT. ANN. § 2301 (Purdon 1973). See also *Commonwealth v. Miller*, 473 Pa. 398, 399, 374 A.2d 1273, 1274 (1977) (per curiam); *Commonwealth v. McCusker*, 448 Pa. 382, 389, 292 A.2d 286, 289 (1972); note 118 and accompanying text *infra*. Thus, taking as true the stated subjective impression of provocation held by the defendant at the time of the killing, the question becomes whether, objectively, his impression of the situation and impassioned reaction thereto was reasonable.

118. *Commonwealth v. Whitfield*, 475 Pa. 297, 304, 380 A.2d 362, 366 (1977), quoting *Commonwealth v. McCusker*, 448 Pa. 382, 389-90, 292 A.2d 286, 290 (1972) (footnote omitted). Sufficient passion is held to render the mind incapable of the cool reflection necessary for murder. *Commonwealth v. Cambric*, 475 Pa. 454, 457 n.4, 380 A.2d 1224, 1225 n.4 (1977).

119. *Commonwealth v. Solomon*, 471 Pa. 417, 418, 370 A.2d 372, 373 (1977); *Commonwealth v. McCusker*, 448 Pa. 382, 389, 292 A.2d 286, 290 (1972).

In *McCusker*, the court found that certain facts within the knowledge of the defendant at the time of the killing could be found sufficient to constitute adequate provocation. It stated:

To establish sufficient provocation appellant relied on three events immediately preceding the slaying: his awareness within the last month before the crime that his wife had entered into meretricious relationship with his step brother; his knowledge within minutes of the crime that his wife was perhaps pregnant with his step brother's child; and his wife's threat immediately before the crime that she was going to leave defendant and take with her his only child.

448 Pa. at 389, 292 A.2d at 289-90. It reversed the judgment of conviction for failure to admit psychiatric evidence seeking to establish this heat of passion defense. *Id.* at 395, 292 A.2d at 293.

120. *Commonwealth v. McCusker*, 448 Pa. 382, 387, 389, 292 A.2d 286, 289 (1972).

killing.¹²¹ Additionally, it appears that where the courts *have* allowed psychiatric testimony regarding the cumulative effect of a series of events to show provocation, the accused's conduct was triggered by some final event and the fatal act was an immediate response.¹²²

In *Commonwealth v. Carroll*,¹²³ a husband unsuccessfully invoked the heat of passion argument.¹²⁴ Following a lengthy argument with his nagging, apparently sadistic wife, and after she had fallen asleep, the defendant shot her twice in the head with a gun which had earlier been placed near the bed at the victim's request.¹²⁵ The defendant's psychiatric expert testified that the defendant was

for a number of years . . . passively going along with a situation which he [was] not controlling and he . . . [was] not making any decisions, and finally a decision . . . [was] forced on him [H]is wife issued an ultimatum that if he went and gave this training course she would leave him He was so dependent upon her he didn't want her to leave. He couldn't make up his mind what to do. He was trapped

[R]age, desperation, and panic [produced] an impulsive automatic reflex type of homicide, . . . as opposed to an intentional premeditated type of homicide.¹²⁶

Emphatically rejecting this "irresistible impulse" argument, the *Carroll* court reasoned that allowing such an excuse to reduce the degree of murder would leave society almost unprotected.¹²⁷ While the decision

121. See *Commonwealth v. Whitfield*, 475 Pa. 297, 380 A.2d 362 (1977). In *Whitfield*, the accused stabbed her mother's common law husband in the throat approximately one hour after an argument over a minor matter. *Id.* at 300, 380 A.2d at 364. The court found that the argument over a trivial matter was not sufficient provocation to sustain a heat of passion defense. *Id.* Additionally, the court held that evidence that the victim had sexually abused the accused during her adolescence would not suffice because the abuse had occurred over seven years before the homicide. *Id.* at 301, 305, 380 A.2d at 364, 366.

122. Compare *Commonwealth v. McCusker*, 448 Pa. 382, 292 A.2d 286 (1972) (psychiatric testimony regarding the defendant's knowledge that his wife was intimately involved with his step-brother and might be carrying his child, and her threat to leave him made moments prior to the homicide, admissible to show cumulative impact causing heat of passion) with *Commonwealth v. Carroll*, 412 Pa. 525, 194 A.2d 911 (1963) (evidence of wife's nagging and abuse of couple's young children not sufficient to sustain an irresistible impulse defense where the husband had shot his wife long after the argument and after she had fallen asleep).

123. 412 Pa. 525, 194 A.2d 911 (1963).

124. *Id.* at 536, 194 A.2d at 917.

125. *Id.* at 528-29, 194 A.2d at 913-14. The wife had forced him to quit a good job, and he suspected that she abused their two young children. *Id.*

126. *Id.* at 534-35, 194 A.2d at 916 (intra-sentence ellipses by the court).

127. *Id.* at 537, 194 A.2d at 917-18, quoting *Commonwealth v. Tyrrell*, 405 Pa. 210, 220-21, 174 A.2d 852, 856-57 (1961); Hall, *Psychiatry and Criminal*

in *Carroll* rested quite heavily on the court's distrust of the proffered psychiatric testimony,¹²⁸ twelve years later the Pennsylvania Supreme Court explicitly endorsed the use of psychiatric testimony in determining whether a defendant acted in the heat of passion, in *Commonwealth v. McCusker*.¹²⁹ Distinguishing *Carroll* from *McCusker*, however, is the fact that the *Carroll* court apparently found that the defendant's argument amounted to a plea of "irresistible impulse,"¹³⁰ a theory the Pennsylvania courts still reject.¹³¹

Once adequate provocation is found, attention focuses upon the defendant's response.¹³² The analysis involves three factors: 1) whether the defendant actually acted in the heat of passion, 2) whether the provocation directly led to the killing, and 3) whether insufficient cooling off time had elapsed, preventing the defendant from using his reasoning powers and capacity to reflect.¹³³ In dealing with this second, essentially subjective, level of inquiry, psychiatric testimony may be admitted to prove the defendant's actual response to the provocation.¹³⁴

Responsibility, 65 YALE L.J. 761, 762 (1956). It must be stressed, however, that the issue in *Carroll* was not whether the testimony of psychiatrists was admissible as bearing on the defendant's state of mind, but rather whether that testimony once given required the trial court to fix the degree of guilt no higher than what is now murder in the third degree. 412 Pa. at 527-28, 194 A.2d at 913.

128. 412 Pa. at 536, 194 A.2d at 917. Writing for the majority, Chief Justice Bell concluded that: "[T]he Courts cannot abdicate to the psychiatrists the task of determining criminal responsibility [and] cannot remit to psychiatrists the right to determine the intent or the state of mind of an accused at the time of the commission of a homicide." *Id.* Noting that expert opinion testimony was entitled to little weight when compared to positive facts, and that the opinion of this defendant's psychiatrist was necessarily based on the defendant's self-serving and feigned statements regarding his state of mind, Chief Justice Bell concluded that the "psychiatrists' opinion [was] . . . entitled to very little weight, . . . especially when the defendant's own actions . . . belie the opinion." *Id.* at 535, 194 A.2d at 917.

129. 448 Pa. 382, 292 A.2d 286 (1972). See notes 119 & 122 *supra*.

130. 412 Pa. at 534-35, 537, 194 A.2d at 916, 918.

131. See, e.g., *Commonwealth v. Walzack*, 468 Pa. 210, 214, 360 A.2d 914, 916 (1976). Irresistible impulse does not amount to an insanity plea. Rather, the defendant contends that the circumstances and emotional state produce an "impulsive, automatic reflex type of homicide . . . as opposed to an intentional premeditated type of homicide." *Commonwealth v. Carroll*, 412 Pa. at 534-35, 194 A.2d at 916. According to one commentator, more than a few jurisdictions have added an irresistible impulse test to their criminal law. W. LAFAYE & A. SCOTT, *supra* note 13, at 283. Critics find the test both too restrictive, in that it does not go far enough beyond the insanity plea, and too liberal in that it broadens the controlling criteria too far. *Id.* at 284.

132. *Commonwealth v. McCusker*, 448 Pa. at 390, 292 A.2d at 290.

133. *Commonwealth v. Whitfield*, 475 Pa. 297, 305, 380 A.2d 362, 366 (1977), quoting *Commonwealth v. McCusker*, 448 Pa. at 390, 292 A.2d at 290.

134. *Commonwealth v. McCusker*, 448 Pa. at 391-92, 292 A.2d at 291-92. Psychiatric testimony is admissible in this situation to show either the psychological likelihood of the defendant's behavior under a given stimulus, or his capacity to form the specific intent to kill. *Commonwealth v. O'Searo*, 466 Pa. at 229, 352 A.2d at 32.

C. *Self Defense*

Pennsylvania attaches no blame or penalty to conduct which might otherwise be criminal, if the conduct is found to have been justified.¹³⁵ Among the justifiable conduct statutorily provided for is the use of deadly force against another when "the actor believes that such force is necessary to protect himself against death [or] serious bodily injury" ¹³⁶ Under this language, the belief in harm must not only be an *actual subjective* belief, but must be *reasonable* as well.¹³⁷ In determining the subjective or actual fear, the courts will consider evidence of the victim's past behavior, if such evidence was known to the defendant and could have contributed to his fear.¹³⁸ In addition, courts will allow psychiatric testimony as to the accused's state of mind to establish the subjective belief.¹³⁹ But the courts have expressly rejected the use of psychiatric testimony if offered to prove the *reasonableness* of the defendant's belief, holding that the standard is an objective standard and so peculiarities of the particular defendant's psyche are irrelevant.¹⁴⁰ However, in analyzing reasonableness, the courts will view the facts as they appeared to the defendant at the time of the killing.¹⁴¹

Applying the justification standard as set out above,¹⁴² the courts have generally found that the fact that the attacker was unarmed will render the use of deadly force in response much harder to justify.¹⁴³

135. 18 PA. CONS. STAT. ANN. § 502 (Purdon 1973). Chapter 5 of the Pennsylvania Crimes Code provides generally for the defenses of justification and excuse for conduct which would otherwise be classified as criminal. Conduct which the defendant believes is necessary to prevent harm either to himself or another individual may be found to be justified. *See id.* §§ 505-506.

136. *Commonwealth v. Black*, 474 Pa. 47, 53, 376 A.2d 627, 630 (1977), quoting 18 PA. CONS. STAT. ANN. § 505(b)(2) (Purdon 1973). The court explained that the statute, as interpreted by case law, provides that:

[T]o establish the defense of self-defense it must be shown that a) the slayer was free from fault in provoking or continuing the difficulty which resulted in the slaying; b) that the slayer must have *reasonably* believed that he was in imminent danger of death or great bodily harm, and that there was a necessity to use such force in order to save himself therefrom; and c) the slayer did not violate any duty to retreat or to avoid the danger.

474 Pa. at 53, 376 A.2d at 630 (emphasis by the court).

137. 18 PA. CONS. STAT. ANN. § 501 (Purdon 1973) (defining "belief" as reasonable belief). *See also* *Commonwealth v. Black*, 474 Pa. 47, 53, 376 A.2d 627, 630 (1977). If such belief is unreasonable, the claim of self-defense will fail, but the defendant might use an unreasonable belief to have the homicide classified as voluntary manslaughter. *See notes* 114-15 and accompanying text *supra*.

138. *Commonwealth v. Stewart*, 483 Pa. 176, 180, 394 A.2d 968, 970 (1978).

139. *Commonwealth v. Light*, 458 Pa. 328, 334, 326 A.2d 288, 292 (1974).

140. *Id.* at 334, 338, 326 A.2d at 292, 294.

141. *Id.* at 334, 326 A.2d at 292.

142. *See notes* 135-41 and accompanying text *supra*.

143. *Commonwealth v. Jones*, 231 Pa. Super. Ct. 300, 305-06, 332 A.2d 464, 466 (1974). *But see* *Commonwealth v. Eberle*, 474 Pa. 548, 379 A.2d 90

As a general rule, a person is required to retreat rather than use deadly force, if he can do so safely.¹⁴⁴ No such duty to retreat is imposed, however, when the person is threatened within his home or place of work, unless the attacker also resides or works there.¹⁴⁵ Once evidence is presented that the defendant was in actual fear for his life,¹⁴⁶ and that such a belief was reasonable,¹⁴⁷ the prosecution must prove that the defendant was not *in fact* acting in self defense.¹⁴⁸ It should be noted that some commentators,¹⁴⁹ and at least one court,¹⁵⁰ have raised the argument that the self defense doctrine as traditionally expressed and understood, amounts to a prejudicial statement of the law which might

(1977). In *Eberle*, the court found sufficient grounds to support a self-defense plea where the victim was an unarmed male; the accused female used deadly force, and the homicide occurred following an argument in which the victim, an occasional live-in guest who had arrived exceedingly drunk, had ripped down shelves and lunged at the defendant. *Id.* at 551-52, 379 A.2d at 92. For a discussion of the male-orientation of traditional notions of justification, and whether such notions amount to a violation of a woman's equal protection rights, see notes 149-51 and accompanying text *infra*.

144. 18 PA. CONS. STAT. ANN. § 505(b)(2)(ii) (Purdon 1973). See also *Commonwealth v. Palmer*, 467 Pa. 476, 481-82, 359 A.2d 375, 378 (1976).

145. 18 PA. CONS. STAT. ANN. § 505(b)(2)(ii)(A) (Purdon 1973). See, e.g., *Commonwealth v. Eberle*, 474 Pa. 548, 556-57, 379 A.2d 90, 95 (1977) (absence of duty to retreat by the defendant, as found by the court, was predicated on conclusion that the victim was not also a resident of the apartment despite his possession of a key, storage of clothing on the premises, and occasional overnight stays); *Commonwealth v. Walker*, 447 Pa. 146, 150, 288 A.2d 741, 743 (1972) ("because both men were residents of the house, both had a duty to retreat and cease the fight."). *Id.*

146. 18 PA. CONS. STAT. ANN. § 505(a) (Purdon 1973). See notes 136-37 and accompanying text *supra*.

147. 18 PA. CONS. STAT. ANN. § 505(b)(2) (Purdon 1973). See notes 137 & 140-41 and accompanying text *supra*.

148. *Commonwealth v. Black*, 474 Pa. 47, 53, 376 A.2d 627, 630 (1977); *Commonwealth v. Walley*, 466 Pa. 363, 367-68, 353 A.2d 396, 399 (1976).

149. *Representation of Women*, *supra* note 1, at 153-56. The author's note:

Sex bias permeates the legal doctrine regarding the perception of imminent and lethal danger. The law assumes that both the attacker and the victim have approximately equal capacities. While a man is assumed to have the ability to perceive danger accurately and respond appropriately, a woman is viewed as responding hysterically and inappropriately to physical threat. However, certain factors relevant to women's experiences are not taken into account. For example, women are less likely to have had training or experience in hand-to-hand fighting. Socially imposed proscriptions inhibit their ability to fend off an attacker. The fact that women generally are of slighter build also gives a male assailant an advantage. All of these conditions will have an impact on the reasonableness of a woman's perception of an imminent and lethal threat to her life such as would justify the use of deadly force. These factors, however, have not usually been considered during the trial.

Id. at 153.

150. *State v. Wanrow*, 88 Wash. 2d 221, 559 P.2d 548 (1977).

rise to the level of a denial of due process and equal protection to women.¹⁵¹

V. THE LAW APPLIED TO THE HYPOTHETICALS

Given this state of the law of homicide in Pennsylvania, analysis will now focus on fitting each of the hypothetical defendants into the structure described to determine whether charges of first degree murder, third degree murder or voluntary manslaughter can be sustained against Alice, Barbara, and Cathy.

All three of the hypothetical defendants could be charged with murder in the first degree under the deadly weapon to a vital part of the body presumption.¹⁵² The Pennsylvania Supreme Court has explained that the deadly weapon inference rests on the principle that, absent evidence to the contrary, a person is presumed to know and intend the probable results of his conduct.¹⁵³ Thus, each of the three defendants could be presumed to have intended the death that resulted from their uses of the knives. In order to reduce the charge of murder of the first degree to murder of the third degree, the jury must be presented with evidence sufficient to overcome this inference, and to permit it to find a lack of premeditation.¹⁵⁴

For Alice, the fact that she waited for Archie to go to bed and fall asleep, and then went to the kitchen to get the knife, supports a finding of premeditation, even without the deadly weapon presumption, by indicating the sort of design and conscious purpose of killing required for conviction of first degree murder.¹⁵⁵ Arguing against this classic example

151. *Id.* at 240-41, 559 P.2d at 558-59. According to the *Wanrow* court, the self defense instruction implies that the jury should apply an objective standard measured by a situation in which a male antagonist faces another male. *Id.* at 240, 559 P.2d at 548, 558-59. By imposing that male image, the court found that the instruction denied the woman defendant her right to equal protection by preventing the jury from considering her size and physical training in relation to that of her opponent. *Id.* The court concluded that "the [defendant] was entitled to have the jury consider her actions in the light of her own perceptions which were the product of our nation's long and unfortunate history of sex discrimination." *Id.* at 240, 559 P.2d at 559, quoting *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

152. *Commonwealth v. O'Searo*, 466 Pa. at 237, 352 A.2d at 37. See notes 95-96 and accompanying text *supra*.

153. *Id.*

154. See notes 104-09 and accompanying text *supra*.

155. *Commonwealth v. O'Searo*, 466 Pa. at 239-40, 352 A.2d at 37; *Commonwealth v. Jones*, 355 Pa. 522, 525, 50 A.2d 317, 319 (1947). In *Jones*, the amount of elapsed time between the provocation and the killing, and the defendant's actions in obtaining a weapon and seeking out his victim, were found by the court to corroborate the inference of the existence of intent to kill and premeditation which had been inferred from the use of a deadly weapon on a vital part of the body. 355 Pa. at 526, 50 A.2d at 319.

Both the majority and the dissent in *Commonwealth v. O'Searo*, cited W. LAFAYE & A. SCOTT, *supra* note 13, for the proposition that evidence as to the defendant's actions prior to the homicide—planning activities directed

of premeditation would indeed be difficult for Alice.¹⁵⁶ Barbara and Cathy, however, have better arguments against premeditation.¹⁵⁷ The impulsive nature of their actions would lend some credibility to their defenses.¹⁵⁸ However, the fact that, well before the incident, Cathy deliberately placed the knife in the drawer weakens her defense considerably.¹⁵⁹ Such action provides evidence of a plan, and thus premeditation, to support the conscious purpose requirement of first degree murder.¹⁶⁰ The facts of Barbara's case fall more strongly in her favor, but her defense is not unassailable. As noted above, the courts have found that even a fraction of a second is sufficient time to formulate premeditation,¹⁶¹ so the absence of a lapse of time does not necessarily assure her acquittal.

Having reached these results under traditional applications of the law, attention will now focus on the outcomes which might be achieved by shaping defenses to incorporate evidence regarding the Battered Spouse Syndrome.¹⁶² Applying the doctrine set out in *Commonwealth v. Stewart*,¹⁶³ which would allow introduction of evidence of terror-stricken state of mind,¹⁶⁴ testimony regarding the Battered Spouse Syndrome and each defendant's experience should be admissible to negate the premeditation required for first degree murder,¹⁶⁵ and so allow a jury to acquit the defendant on first degree murder charges.¹⁶⁶ In

toward the killing—would support a conclusion that the killing was premeditated. 466 Pa. at 240 n.5, 242, 352 A.2d at 38 n.5, 39.

156. For the arguments which might be raised, see notes 167-71, 191-94 & 203-06 and accompanying text *infra*.

157. See notes 158-68, 183-87, 198-202 & 212-24 and accompanying text *infra*.

158. See 18 PA. CONS. STAT. ANN. § 2502(a) & (d) (Purdon Supp. 1980-1981). See also notes 86-90 & 93-94 and accompanying text *supra*.

159. See *Commonwealth v. Carroll*, 412 Pa. at 536, 194 A.2d at 917; notes 93-94 and accompanying text *supra*.

160. See notes 89-94 and accompanying text *supra*.

161. See *Commonwealth v. O'Searo*, 446 Pa. 224, 352 A.2d 30 (1976); *Commonwealth v. Earnest*, 342 Pa. 544, 21 A.2d 38 (1941); *Commonwealth v. Scott*, 284 Pa. 159, 130 A. 317 (1925). See also notes 89-94 and accompanying text *supra*.

162. See notes 24-62 and accompanying text *supra*.

163. 461 Pa. 274, 336 A.2d 282 (1975). See notes 105-07 and accompanying text *supra*.

164. 461 Pa. at 282-83, 336 A.2d at 285. See notes 105-07 and accompanying text *supra*.

165. See notes 88-90 and accompanying text *supra*.

166. Women suffering from the Battered Spouse Syndrome frequently live in a state of constant terror. Steinmetz, *supra* note 4, at 330. Dr. Steinmetz cites research on 60 battered women which suggests that the women were "a study on paralyzing terror . . ." *Id.*, citing Hilberman & Munson, *Sixty Battered Women*, 2 VICTIMOLOGY 460, 464 (1977). One commentator quotes a woman as recounting the following:

I know the horrors of beating; of being shot at and pistol-whipped; of being tied up to watch while my grave was being dug; of having

Barbara's and Cathy's cases, the terror-stricken state more closely resembles that present in *Stewart*¹⁶⁷—specifically, a history of violence with immediate events triggering a perception of similar, imminent violence.¹⁶⁸ A jury could probably comprehend these panic stricken states without expert testimony. All that is required for this approach is that the court admit, as relevant, testimony regarding the past instances of violence. In Alice's case, however, a substantial period of time elapsed and more evidence of conscious design exists,¹⁶⁹ presenting a more difficult burden of proof. Applying the principle that it is the actual formation of specific intent to kill, and not just the passage of time, that is controlling in finding first degree murder,¹⁷⁰ an argument might be made for acquitting Alice on the first degree murder charges. By establishing that Alice was in a continuing state of terror-stricken panic, the defense could show she could not formulate the specific intent necessary to support a conviction.¹⁷¹ However, it is likely that a jury would not be able to comprehend Alice's prolonged terror-stricken state, and would not overcome the natural assumption of premeditation which arises from the amount of elapsed time, without the benefit of expert testimony on the effects of the Battered Spouse Syndrome.

Pennsylvania allows expert testimony regarding phenomena not within the common knowledge of the average juror,¹⁷² and defines an expert witness as someone who, because of his possession of certain knowledge not within the reach of the ordinary person, is particularly qualified to speak on a given subject.¹⁷³ Thus, if the Battered Spouse Syndrome is viewed as a phenomenon beyond the ordinary knowledge of the jury, expert testimony regarding its effect might be admissible. However, unless the battered spouse's condition is presented as a special syndrome, a convincing argument could be raised that the effects that living in the

my husband hold a gun to my child's head demanding obedience and threatening to pull the trigger; of trying to prevent my 12 year old daughter from being raped by my husband, while Father laughs and states, 'I am king of this house and can do as I damn well please.' I and my children have received many beatings. I have cigarette burns on my arms, a broken nose, cracked chest and ribs, a concussion and a cracked pelvic bone. My children were terrorized by their father's attempt to run over my 4 year old son, and by his act of beheading our pet horse.

I tried separation but was brought back to the house at gunpoint. He has told me repeatedly that neither my children nor myself would ever be free from him and that he would stop at nothing to destroy us.

Meyers, *supra* note 4, at 48.

167. See note 107 and accompanying text *supra*.

168. 461 Pa. at 277, 282, 336 A.2d at 285-87.

169. See Part II, Hypothetical 1, *supra*.

170. *Commonwealth v. Stewart*, 461 Pa. at 279, 336 A.2d at 285. See notes 105-07 and accompanying text *supra*.

171. *Id.*

172. *Collins v. Zediker*, 421 Pa. 52, 53, 218 A.2d 776, 777 (1966).

173. *Steele v. Shepperd*, 411 Pa. 481, 192 A.2d 397, 398 (1963).

battered spouse's situation would have on an individual are inferences to be drawn by the jury from testimony regarding what has occurred, and are not proper subjects for conclusory statements by an expert. In *Ibn-Tamas v. United States*,¹⁷⁴ a medical expert's testimony regarding the Battered Spouse Syndrome was offered in defense to a murder charge.¹⁷⁵ The trial court rejected the testimony.¹⁷⁶ The District of Columbia Court of Appeals remanded the case because it could not tell from the record why the court below had barred the testimony.¹⁷⁷ In remanding, however, the court took the further step of approving the Battered Spouse Syndrome as an appropriate subject for expert testimony.¹⁷⁸

Moving on, it is possible that Alice, Barbara and Cathy can employ evidence of the Battered Spouse Syndrome not just to reduce the degree of murder, but rather to gain acquittal on the murder charges altogether. If the defendants can use testimony regarding the effects of the Battered Spouse Syndrome to show that they lacked malice¹⁷⁹ when they killed, they could achieve that result. The defendants could show lack of malice by establishing either of two conditions: 1) that they acted under a sudden and intense passion resulting from provocations;¹⁸⁰ or 2) that they *subjectively*, albeit *unreasonably*, believed the killings were justified.¹⁸¹ Under the unreasonable belief in justification branch,¹⁸² Barbara and Cathy can present stronger cases for reduction in degree than can Alice, but again, none has a pat argument.¹⁸³ Both Bill and Carl approached their wives unarmed, a factor which has traditionally increased the burden in justifying use of deadly force,¹⁸⁴ and which makes Barbara's and Cathy's allegations of actual belief in justification harder to prove.¹⁸⁵ Nevertheless, Cathy could argue that, based on the effects

174. 407 A.2d 626 (D.C. 1979).

175. *Id.* at 628.

176. *Id.*

177. *Id.*

178. *Id.* at 638. The court noted that it is acceptance of the reliability of the particular methodology employed in an emerging field, not the quantity of substantive knowledge available in the field, which qualifies an area as an appropriate subject for expert testimony. *Id.* at 638.

179. For a description of the malice requirement necessary to raise a homicide to murder, see notes 74-79 and accompanying text *supra*.

180. 18 PA. CONS. STAT. ANN. § 2503(a) (Purdon's 1973). See note 114 and accompanying text *supra*.

181. 18 PA. CONS. STAT. ANN. § 2503(b) (Purdon 1973). See also note 115 and accompanying text *supra*. It must be recalled that if the defendant's belief is *reasonable*, the more appropriate plea is absolute justification under self defense. 18 PA. CONS. STAT. ANN. § 505 (Purdon 1973). See notes 135-51 and accompanying text *supra*.

182. See note 115 and accompanying text *supra*.

183. See notes 184-94 and accompanying text *infra*.

184. See note 143 and accompanying text *supra*.

185. *Id.*

of the prior beatings, Carl's threats, and the fact that the beating was in progress, she actually believed that her life, and the life of her unborn child, were in danger.¹⁸⁶ The placing of the knife in the drawer, however, may be found to be evidence of some design in the homicide, and might make Cathy's proffered justification appear to be merely an excuse for murder. On the other hand, properly presented, that conduct might serve as evidence of her continuing fear and so tend to support her belief in the imminent danger. Cumulative evidence is admissible to show heat of passion generated by adequate accumulated provocation, when presented by a defendant seeking to reduce a murder charge to voluntary manslaughter.¹⁸⁷

In Barbara's case, the threat to life is less evident. Bill did not attack her, but did begin the insults and verbal abuse which had regularly preceded his beatings.¹⁸⁸ While a defendant's belief in imminent danger need not be reasonable under this theory,¹⁸⁹ the more unreasonable the accused's perception appears, the more difficult it will be to convince a jury of the defendant's subjective belief. To overcome this credibility problem, Barbara might employ evidence of the Battered Spouse Syndrome to show the terror which Bill's behavior, historically an indicator of imminent physical attack, might invoke in her.¹⁹⁰

Alice once again faces the problem of the time lapse between the beating and her homicidal conduct.¹⁹¹ Under traditional notions of danger, it is unlikely that Alice could convince a jury that she feared death—reasonably or unreasonably—at the time she killed Archie.¹⁹² Set in the context of the Battered Spouse's state of desperation,¹⁹³ however, Alice's contention that she *actually* feared for her life becomes more plausible, especially in view of Archie's threats to kill Alice and their child, and his behavior upon finding them when they had left. Alice's defense would turn on the judge's allowing as relevant, and the jury's believing as credible, evidence of the constant and continuing fear created by years of entrapment in a hopeless and brutal marriage.¹⁹⁴

The second avenue available for reducing the charges against the three defendants is the heat of passion branch of voluntary man-

186. See Part II, Hypothetical 3, *supra*.

187. Commonwealth v. Solomon, 471 Pa. 417, 418, 370 A.2d 372, 373 (1977); Commonwealth v. McCusker, 448 Pa. 382, 389, 292 A.2d 286, 290 (1972). See notes 119-20 and accompanying text *supra*.

188. See Part II, Hypothetical 2, *supra*.

189. 18 PA. CONS. STAT. ANN. § 2503(b) (Purdon 1973). See also note 115 and accompanying text *supra*.

190. See notes 32-33 and accompanying text *supra*.

191. See notes 117-20 and accompanying text *supra*.

192. To justify the use of deadly force, the feared violence must be imminent or immediate. See notes 136-37 and accompanying text *supra*. See also W. LAFAYE & A. SCOTT, *supra* note 13, at 394.

193. See notes 41-56 and accompanying text *supra*.

194. See notes 46-55 and accompanying text *supra*.

slaughter.¹⁹⁵ Evidence that the defendants' actions were motivated by intense passion¹⁹⁶ evoked by serious or adequate provocation¹⁹⁷ would be necessary to successfully invoke this theory. Cathy has the strongest case under the provocation theory. The vicious physical attack could be found to be a serious provocation creating the sort of passion that would negate malice.¹⁹⁸ Barbara would find it more difficult to establish that Bill's insults amounted to provocation.¹⁹⁹ She might argue that given the past scenarios in which Bill's insults led to increasingly brutal assaults, his verbal abuse on the night of the stabbing triggered an intense emotional response. Here, again, expert testimony on the effects of the Battered Spouse Syndrome²⁰⁰ would be necessary.²⁰¹ Helping Barbara under this theory is the fact that the courts have found that the cumulative impact of a series of events may be found to be adequate provocation to reduce murder to manslaughter.²⁰²

Alice would face a more difficult task than would Barbara or Cathy in pleading terror or cumulative impact. The elapsed time between the beating and her action again seems to provide sufficient time for the passion to cool²⁰³ and for Alice to regain her capacity to think clearly.²⁰⁴ In order to sustain her defense, Alice would have to show intense passion—essentially a continuing state of terror—which, because of the cumulative effects of her life as a battered spouse, did not diminish in the time following the beating. For this, expert testimony on the Battered Spouse Syndrome²⁰⁵ would be essential.²⁰⁶ It is submitted that the success of all three defendants' attempts to reduce their murder charges would depend on the willingness of the courts to allow as rele-

195. See 18 PA. CONS. STAT. ANN. § 2503(a)(2) (Purdon 1973). See also notes 114-18 and accompanying text *supra*.

196. Commonwealth v. O'Searo, 466 Pa. at 240 & n.6, 352 A.2d at 38 & n.6. See notes 114-18 and accompanying text *supra*.

197. Commonwealth v. Whitfield, 475 Pa. 297, 305, 380 A.2d 362, 366. (1977). See notes 116-18 and accompanying text *supra*.

198. See notes 116-18 and accompanying text *supra*.

199. Commonwealth v. Drum, 58 Pa. 9, 17 (1868); see note 116 *supra*.

200. See notes 24-62 and accompanying text *supra*.

201. *Representation of Women*, *supra* note 1, at 162. The authors suggest that to establish that a woman who has suffered years of physical and sexual abuse by her husband has a particularly extreme reaction to similar assaults will require careful explanation of background factors by an expert sociologist, psychologist or psychiatrist. *Id.*

202. See note 119 and accompanying text *supra*. However, it must be recalled that the courts distinguish cumulative impact from mere use of past events to excuse a present homicidal conduct. See note 121 and accompanying text *supra*. Merely carrying a grudge for past wrongs is differentiated from responding to the accumulated effect of a continuing series of events. *Id.*

203. See Commonwealth v. Whitfield, 475 Pa. 297, 305, 380 A.2d 364, 366.. See note 121 and accompanying text *supra*.

204. See text accompanying note 118 *supra*.

205. See notes 24-62 and accompanying text *supra*.

206. See note 201 and accompanying text *supra*.

vant testimony regarding the abuse they have undergone, and permitting testimony by expert witnesses on the peculiar mental condition identified as the Battered Spouse Syndrome.²⁰⁷

Discussion to this point has focused on reducing the seriousness of the charges against each defendant.²⁰⁸ Attention will now turn to an absolute defense: the self defense plea.²⁰⁹ The impaired mental state defenses are often automatically relied upon by attorneys representing women who commit violent acts.²¹⁰ In the opinion of two attorneys who have handled the defenses of a number of battered women, however, such homicides are more appropriately dealt with as cases of self defense.²¹¹

On the facts of the hypotheticals, it would appear that Cathy has the strongest case for pleading self defense—responding to a brutal assault that she perceived to threaten not only her own life, but also that of her unborn child, she could be found to have had a subjective apprehension of imminent death or great danger.²¹² The fact that Carl was unarmed, however, will make it harder for Cathy to convince a jury of her subjective fear²¹³ and the reasonableness of that fear.²¹⁴ But Cathy's pregnancy, the savageness of the beatings, and Carl's previous threats provide the factual setting for Cathy's response and testimony regarding that state of affairs would support her contention of actual fear.

Cathy may have more difficulty in showing that her fears were reasonable. The courts apply an objective standard to determine reasonable-

207. See notes 24-62 & 174-78 and accompanying text *supra*.

208. See notes 152-207 and accompanying text *supra*.

209. See notes 135-51 and accompanying text *supra*.

210. *Representation of Women*, *supra* note 1, at 144.

211. *Id.* at 144, 160-61. The authors suggest that:

[A] self-defense approach should be thoroughly explored as a first step. The traditional view of women who commit violent crimes is that their action was irrational or insane. Consequently, an impaired mental state defense has often been relied on automatically. We start from the premise that a woman who kills is no more "out of her mind" than a man who kills. Our work has shown that the circumstances which require a woman to commit a homicide in these cases can demonstrate that her act was reasonable and necessary. Accordingly, if possible, the homicide should be defended as self-defense.

Id. at 144 (footnote omitted). They go on to observe:

Women generally have been viewed as more prone to hysteria and panic than men. Women who violated that stereotype by being strong and independent or violent were treated as hysterics. It is our belief that many women who committed homicides and were considered disturbed by society, their lawyers, and even themselves, might now be viewed as having acted in self-defense.

Id. at 161, citing W. LAFAVE & A. SCOTT, *supra* note 13, at 573.

212. 18 PA. CONS. STAT. ANN. § 505(2) (Purdon 1973). See note 136 and accompanying text *supra*.

213. See note 143 and accompanying text *supra*.

214. See notes 137 and accompanying text *supra*. See also *Commonwealth v. Light*, 458 Pa. 328, 338, 326 A.2d 288, 292 (1974).

ness,²¹⁵ and consider the issue an inappropriate subject for psychiatric testimony. However, applying the principle of *Commonwealth v. Light*²¹⁶ that reasonableness is judged on the facts as they appeared to the defendant, the circumstances and background would support the reasonableness of Cathy's use of deadly force.²¹⁷ Cathy might still have difficulty in convincing a jury that her resort to deadly force was reasonable in the face of an assault by an unarmed man.²¹⁸ The self defense doctrine is phrased in male terms and evokes an image of two men in conflict.²¹⁹ Accurate and explicit testimony regarding the Battered Spouse Syndrome will help diffuse this inherent prejudice,²²⁰ but unless the courts are willing to adopt the reasoning of the Washington Supreme Court in *State v. Wanrow*,²²¹ Cathy faces a difficult set of hurdles.

Barbara's case is not nearly as strong as Cathy's since Bill did not touch her before she acted—he merely moved toward her. She might argue, nevertheless, that, much like Dean Prosser's motionless highway man, who was found to have committed an assault without speaking or moving,²²² Bill communicated an implicit threat by his insults and accusations and by what Barbara knew them to preface. In this regard, the rule that admits evidence of the victim's past behavior, if known to the accused, to establish subjective apprehension,²²³ will be helpful. Perhaps more helpful is the admissibility of psychiatric testimony to establish subjective fear of imminent danger.²²⁴

While Barbara and Cathy's self defense claims might succeed as the law stands, adding only an understanding and accommodation of the Battered Spouse Syndrome, it appears that the law is far from ready to condone Alice's conduct. It would be difficult indeed to convincingly

215. *Commonwealth v. Light*, 458 Pa. 328, 334, 326 A.2d 288, 292 (1974). See note 140 and accompanying text *supra*.

216. 458 Pa. 328, 334, 326 A.2d 288, 292 (1974).

217. *Id.* See *Representation of Women*, *supra* note 1, at 153-54. The authors suggest that, in defending women who have struck back against abuse, the individual woman's perspective must be presented. *Id.* They argue that the judge and jury must be educated about the tragic situation of spouse abuse and child abuse, the lack of official response to these problems, and the extent to which such abuse can explain the defendant's actions. *Id.*

218. See note 143 and accompanying text *supra*.

219. See notes 149-51 and accompanying text *supra*.

220. *Id.*

221. See 88 Wash. 2d 221, 240-41, 554 P.2d 548, 558-59 (1977); notes 150-51 and accompanying text *supra*.

222. W. PROSSER, LAW OF TORTS § 10, at 40 (4th ed. 1971). Prosser observed: "It may be suggested that a perfectly motionless highwayman, standing with his pistol pointed and his finger on the trigger, who . . . appears to the plaintiff's view, commits an assault. It is the immediate physical threat which is important, rather than the manner in which it is conveyed." *Id.*

223. *Commonwealth v. Stewart*, 483 Pa. 176, 180, 394 A.2d 968, 970 (1978). See note 138 and accompanying text *supra*.

224. *Commonwealth v. Light*, 458 Pa. at 334, 326 A.2d at 292. See note 139 and accompanying text *supra*.

argue reasonable apprehension of imminent danger when Alice waited so long after the beating to take action. Yet certainly, in view of the data on the Battered Spouse Syndrome,²²⁵ it is possible to posit a continuous, constant apprehension. However, such a view might be thought to stretch self defense beyond what the doctrine will bear. Some suggest that "[t]o in anyway advocate, even tacitly, that someone should use deadly force at any other time than the time when his life is in immediate danger, to allow a time lag, would be to condone murder."²²⁶

VI. CONCLUSIONS

It is submitted that the current legal system and its general unresponsiveness to domestic violence²²⁷ contributes to the psychological conditioning identified as the Battered Spouse Syndrome,²²⁸ and forces battered women into the position where they perceive their only recourse to be striking back at their abusers.²²⁹ Whether that legal system provides justice in a situation it has helped to create will depend on its response to research concerning the battered spouse.

Based on the foregoing discussion, it is submitted that under Pennsylvania law, a battered spouse who kills her husband in response to physical abuse might be able to reduce a first degree murder charge to third degree murder based on lack of premeditated intent to kill,²³⁰ and might reduce it even further under the heat of passion doctrine.²³¹ However, analysis of the circumstances which force women to respond to life-threatening situations suggests the appropriateness of a self defense plea rather than an impaired mental state argument.²³² It is submitted, however, that the law as it now stands is unresponsive to such an approach.²³³

It is further submitted that the law must take into account the effects of the Battered Spouse Syndrome not only in grading a homicide, but also in determining whether a killing might be excused as justified. Some contend that such an application of the law would amount to condoning murder.²³⁴ It is maintained, however, that, given the availability of research and expert testimony on the mental condition asso-

225. See notes 24-62 and accompanying text *supra*.

226. Meyers, *supra* note 4, at 48.

227. See notes 4-17 and accompanying text *supra*.

228. See notes 24-62 and accompanying text *supra*.

229. See notes 56-62 and accompanying text *supra*.

230. See notes 73-112 & 152-78 and accompanying text *supra*.

231. See notes 113-34 & 195-207 and accompanying text *supra*.

232. *Representation of Women*, *supra* note 1, at 144, 160. See note 211 and accompanying text *supra*.

233. See notes 213-14, 218-21 & 225-26 and accompanying text *supra*.

234. Meyers, *supra* note 4, at 48. See note 226 and accompanying text *supra*.

ciated with the Battered Spouse Syndrome²³⁵ and the ability to employ expert testimony regarding mental state,²³⁶ such a step would *not* condone murder, but would instead represent a logical extension and accurate application of the principles of culpability and justification embodied in our legal system.

Doris Del Tosto

235. See notes 24-62 and accompanying text *supra*.

236. See notes 109 & 129 and accompanying text *supra*.